LEE ING CHIN & ORS

v.

GAN YOOK CHIN & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: M-02-241-2001]
11 FEBRUARY 2003

SUCCESSION: *Will - Validity of will - Testamentary capacity - Principles applicable - Whether deceased testator had testamentary capacity - Due execution of will - Whether there was due execution before two witnesses - Suspicious circumstances surrounding making of will - Whether dispelled by contrary evidence - Whether trial judge erred in his evaluation of evidence*

EVIDENCE: *Expert evidence - Chinese characters - Danger of accepting expert evidence on Chinese characters - Whether sufficiently considered by trial judge - Whether more weight should have been given to direct conflicting testimony of uninterested witness*

SUCCESSION: *Will - Gift of shares - Whether a testamentary gift - Whether Wills Act 1959 complied with - Whether shares formed part of deceased's residual estate*

The plaintiffs (the respondents herein) and the defendants (the appellants herein) were the beneficiaries of a will executed by one Mr. Gan Puay Chee who had since passed away ('the deceased'). The plaintiffs who were dissatisfied with the will commenced an action in the High Court to declare it invalid. The learned judicial commissioner ('JC') found for them and struck it down. He also declared that the *inter vivos* gift of shares of Malayan Banking Berhad to the beneficiaries was invalid. Hence, the defendants' appeal.

The issues were: (1) whether the deceased had the testamentary capacity to make his will; (2) whether there was due execution of the will before two witnesses, DW2 and DW3; and (3) whether there were suspicious circumstances surrounding the making of the will.

Held:
Per Gopal Sri Ram JCA

[1] There was not a shred of evidence, medical or otherwise, to show that the deceased lacked the mental capacity to make his will. The finding of the JC on the lack of mental capacity based on the available medical

evidence was a matter of pure speculation and conjecture. The medical evidence did not support a conclusion that the deceased suffered from unsoundness of mind at any time, in particular at the date of the will. The JC's conclusion on the mental state of the deceased was plainly wrong and constituted a serious misdirection that had occasioned a miscarriage of justice. (p 41 e-h)

[2] The JC failed to apply the correct tests to determine the credibility of DW2 and DW3. Neither took an interest under the will. There was no prevarication of evidence at all on the part of DW2. She had made it clear beyond any doubt that the deceased signed the will in her presence and that she did in fact attest the will. Further, the JC did not judicially appreciate DW2's evidence by testing her answers given under cross-examination against the rest of her evidence and the probabilities of the case. It was apparent that the JC accepted the version of PW3 and PW9 of what had happened. Further, the failure of the JC to evaluate the evidence of DW3 altogether constituted a serious misdirection. (pp 42 b-c, 49 e-g & 51 a-c)

[3] DW2 and DW3 testified that the deceased was entirely lucid and mentally alert both at the time of giving instructions and at the time of signing the will. Their evidence puts paid to any suggestion of a lack of mental capacity on the part of the deceased at the time he signed his will. (p 51 c-e)

[4] The mere fact that the deceased was seriously ill with cancer or that the first defendant being the propounder of the will was present at the execution of the will did not throw any doubt on the validity of the will. There was ample evidence that supported a finding in favour of the validity of the will. (p 53 e-f)

[5] A man's ability to sign his cheques in order to make payments demonstrates his capacity to understand the nature and consequences of his act. And if the deceased could do this as alleged by DW12, it was plain that he was certainly in a position to give instructions for a will when read and explained to him and to place his signature on it. The effect of such evidence was to corroborate DW2 and DW3 and simultaneously to destroy any suspicious circumstances surrounding the making of the will. There was no appreciation at all of the importance of the evidence of DW12. This failure of the JC was a non-direction amounting to misdirection. (p 54 a-d)

[6] The plaintiffs' suggestion that the cheques were undated when they were signed militated against the probabilities of the case. The deceased was a careful man. He would not have agreed to sign undated cheques. DW12's evidence was entirely consistent with the probabilities of the case and it followed that the deceased was in full possession of his mental faculties when he gave the instructions to DW2 to prepare the will and later executed it in the presence of DW2 and DW3. (p 54 d-g)

[7] It is a well-established principle of judicial appreciation of evidence that the same test should be applied to the evidence of the plaintiff and the defendant. There must be uniformity of approach. In the present case, there was a duality of approach by the JC and it had occasioned a miscarriage of justice. (p 55 e-f)

[8] The JC did not take into account the added danger of accepting expert evidence in the particular context of Chinese characters. On the contrary, the JC appeared to have placed undue weight on the expert evidence. Further, the JC was only prepared to displace in his judicial mind the evidence of one set of experts with another. The JC fell into serious error when adopting this over simplistic approach to the evaluation of the totality of the evidence. Where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, it is a safe course for a court to prefer the direct evidence. The JC erred in not preferring the evidence of DW2 and DW3 to that of the handwriting experts. (pp 56 h-i, 57 a-i & 58 a-b)

[9] With great respect to the JC, he had already arrived at a concluded view on the issue of the deceased's soundness of mind even before commencing his inquiry into that very issue. This constituted a serious misdirection that had the effect of depriving the defendants of substantive justice. (p 58 b-e)

[10] The existence of suspicious circumstances in the making of the will was more than adequately explained by both DW2 and DW3. Once it was accepted that the deceased understood the dispositions of the will, and that it was duly executed by him as his will, there was an end to any and all of the so-called suspicious circumstances and all other collateral issues raised against the validity of the will. (p 58 f-h)

[11] The evidence of the first defendant was consistent with that of DW2 and DW3. It was entirely unfortunate that the JC disbelieved the first defendant. Further, the fact that the deceased did not raise any protest

to DW2 or DW3 when the will was explained to him and placed before him for his signature and the fact that he signed it provided ample corroboration of the first defendant's story. (p 60 b-e)

[12] A court of probate must be satisfied that a testator understood the dispositions of a will, and duly executed by him as his will. Once so satisfied, it is not concerned with the fairness of the will. A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just. (p 60 f-g)

[13] The alleged gift of the shares was in reality a testamentary gift. Since it was not made in accordance with the provisions of the Wills Act 1959, it was utterly void. The shares therefore form part of the deceased's estate. Since the deceased in his will had provided for a residue of his estate, all the shares form part of the general residue and fall to be dealt with as directed by the deceased's will. The same applied to the fixed deposits that were in the joint names of the deceased and/or the third defendant. (pp 63 g-i & 64 a-c)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif (responden-responden di sini) dan defenden-defenden (perayu-perayu di sini) merupakan benefisiari-benefisiari di bawah wasiat En. Gan Puay Chee ('si-mati') yang telah pun meninggal dunia. Perayu-perayu tidak puas hati dengan wasiat itu dan memulakan satu tindakan di Mahkamah Tinggi untuk mengistiharkannya tidak sah. Pesuruhjaya kehakiman ('PK') mendapati untuk plaintif-plaintif dan memutuskan wasiat itu tidak sah. Beliau juga mengisytiharkan bahawa syer-syer Malayan Banking Berhad yang dihadiahkan kepada benefisiari-benefisiari tidak sah. Maka rayuan defendan-defendan ini.

Isu-isunya adalah: (1) sama ada si-mati mempunyai keupayaan perwasiatan bila membuat wasiatnya itu; (2) sama ada wasiat telah disempurnakan dengan betul di hadapan dua saksi-saksi, DW2 dan DW3; dan (3) sama ada terdapat keadaan-keadaan sangsi dalam penyempurnaan wasiat itu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tiada apa-apa jua keterangan, dari segi keterangan perubatan atau sebaliknya, yang menunjukkan bahawa si-mati tidak mempunyai keupayaan mental untuk menyempurnakan wasiatnya. Pendapat PK bahawa si-mati tidak mempunyai keupayaan mental berdasarkan keterangan perubatan merupakan spekulasi dan andaian sahaja.

Keterangan perubatan tidak menyokong kesimpulan bahawa si-mati mengalami gangguan fikiran pada bila-bila masa, terutamanya pada tarikh wasiat itu disempurnakan. Kesimpulan PK mengenai keadaan mental si-mati adalah salah dan merupakan satu salah arah serius yang telah mengakibatkan salah laksana keadilan.

[2] PK gagal memakai ujian yang betul untuk menentukan kebolehpercayaan DW2 dan DW3. Kedua-duanya tidak mempunyai kepentingan di bawah wasiat itu. Tiada pemalsuan keterangan langsung oleh DW2. Beliau telah menjelaskan tanpa apa-apa keraguan bahawa si-mati menandatangani wasiat itu dengan kehadirannya dan beliau memang mengakusaksi wasiat itu. Tambahan pula, PK tidak menilai keterangan DW2 secara kehakiman dengan menguji jawapan-jawapan yang diberikan olehnya semasa pemeriksaan balas terhadap keterangan lain dan kebarangkalian kes. Adalah jelas bahawa PK menerima versi PW3 dan PW9. Lagipun, kegagalan PK untuk menilai keterangan DW3 sama sekali telah menjadi satu salah arah serius.

[3] DW2 dan DW3 memberi keterangan bahawa si-mati memang waras dan berwaspada semasa beliau memberikan arahan-arahannya dan menandatangani wasiatnya. Keterangan mereka menentukan bahawa si-mati tidak mengalami kekurangan keupayaan mental semasa beliau menandatangani wasiatnya.

[4] Walaupun si-mati mengalami penyakit kanser yang serius dan defenden pertama yang mengemukakan wasiat itu hadir semasa penyempurnaan wasiat itu, ini tidak bermakna bahawa keesahan wasiat itu disangsikan. Terdapat banyak keterangan yang menyokong keesahan wasiat itu.

[5] Kemampuan seseorang untuk menandatangani cek-cek bagi pembayaran menunjukkan keupayaannya untuk memahami sifat dan akibat perbuatannya itu. Dan jika si-mati boleh berbuat demikian seperti yang didakwa DW12, ianya jelas bahawa beliau memang dalam keadaan waras untuk memberi arahan-arahan bagi wasiat itu apabila ianya dibaca dan dijelaskan kepadanya dan diletakkan kepadanya untuk tandatangannya. Keterangan tersebut menyokong DW2 dan DW3 dan seterusnya menghapuskan apa-apa keadaan-keadaan curiga dalam penyempurnaan wasiat itu. Tiada penilaian langsung terhadap kepentingan keterangan DW12. Kegagalan PK berbuat demikian merupakan satu salah arah.

[6] Hujahan plaintif-plaintif bahawa cek-cek tersebut tidak bertarikh semasa ditandatangani bertentangan dengan kebarangkalian kes. Si-mati adalah seorang yang cermat. Tidak mungkin beliau bersetuju untuk menandatangani cek-cek yang tidak bertarikh itu. Keterangan DW12 selaras dengan kebarangkalian kes sepenuhnya dan ini bermakna bahawa

si-mati memang waras apabila beliau memberikan arahan-arahan kepada DW12 untuk menyediakan wasiatnya itu dan kemudian menyempurnakannya di hadapan DW2 and DW3.

[7] Rukun menetapkan bahawa penilaian kehakiman keterangan plaintif dan defenden mestilah dinilaikan dengan memakai ujian yang sama. Mestilah terdapat pendekatan sama kepada keterangan parti-parti tersebut. Dalam kes semasa, PK telah memakai pendekatan berlainan yang telah mengakibatkan salah laksana keadilan.

[8] PK tidak menimbangkan bahayanya menerima keterangan saksi pakar terutamanya dalam konteks huruf Cina. Sebaliknya, PK telah meletakkan beban yang tidak patut atas keterangan tersebut. Tambahan pula, PK dalam pemikiran kehakimannya, hanya sanggup untuk menggantikan keterangan satu pihak saksi pakar dengan yang lain. PK telah melakukan kesilapan yang serius apabila beliau mengambil pendekatan yang terlampau memudahkan dalam penilaian keseluruhan keterangan. Di mana terdapat konflik yang nyata di antara testimoni terus saksi yang tidak ada kepentingan dalam kes tersebut dan saksi pakar tulisan terhadap kesejatian pelaksanaan dokumen, maka adalah selamat untuk mahkamah memilih keterangan yang terus. Maka, PK terkhilaf apabila beliau tidak memilih keterangan DW2 dan DW3 dan sebaliknya memilih saksi-saksi pakar tulisan.

[9] Dengan hormatnya kepada PK, beliau telah pun memutuskan mengenai kewarasan pemikiran si-mati sebelum beliau memulai persoalan isu tersebut. Ini telah membawa kepada satu salah arah serius yang melucutkan defendan-defendan keadilan yang substantif.

[10] Kewujudan keadaan-keadaan sangsi dalam penyempurnaan wasiat telah dengan secukupnya dijelaskan oleh DW2 dan DW3. Apabila diterima bahawa si-mati memahami kandungan wasiat itu, dan ianya disempurnakan sebagai wasiatnya, maka lenyaplah segala keadaan-keadaan yang sangsi dan semua isu-isu kolateral lain yang timbul terhadap keesahan wasiat itu.

[11] Keterangan defendan pertama selaras dengan keterangan DW2 dan DW3. Malangnya PK tidak mempercayai defendan pertama. Tambahan pula, fakta bahawa si-mati tidak membangkitkan apa-apa bantahan kepada DW2 atau DW3 apabila wasiat itu dibacakan kepadanya dan diletakkan di depannya untuk tandatangannya dan seterusnya si-mati menandatangani wasiat itu, menyokong keterangan defendan pertama secukupnya.

[12] Mahkamah probet mesti berpuas hati bahawa pewasiat memahami kandungan wasiat dan menyempurnakannya sebagai wasiatnya. Setelah ini diatasi, mahkamah tidak patut menimbangkan keadilan wasiat itu. Mahkamah mesti mengelak kemahuan semulajadi untuk mengetepikan wasiat atas alasan bahawa ia tidak adil, saksama, atau patut.

[13] Hadiah syer-syer tersebut sebenarnya hadiah perwasiatan. Oleh kerana ia tidak dibuat mengikut peruntukan-peruntukan Akta Wasiat 1959, ia tidak sah. Dengan itu, syer-syer tersebut merupakan sebahagian harta pusaka si-mati. Oleh kerana si-mati dalam wasiatnya telah menetapkan untuk baki harta pusakanya, semua syer-syer tersebut termasuk ke dalamnya dan mestilah dikendalikan sepertimana diarahkan oleh si-mati dalam wasiatnya. Ini juga terpakai kepada deposit-deposit tetap yang berada di atas nama si-mati dan/atau defendan ketiga.

Rayuan dibenarkan.]

Case(s) referred to:

Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***
Armagas Ltd v. Mundogas SA ("The Ocean Frost") [1985] 1 LIR 1 ***(refd)***
Arunachalam Chetty v. Ramaswami Chetty [1916] 20 CWN 673 ***(refd)***
Banks v. Goodfellow [1870] LR 5 QB 549 ***(refd)***
Bankim Bihari v. Matangini Dasi AIR [1919] PC 157 ***(refd)***
Barry v. Butlin [1838] 12 ER 1089 ***(refd)***
Billinghurst v. Vickers [1810] ER 956 ***(refd)***
Blackwell v. Blackwell [1929] AC 318 ***(refd)***
Brown v. Fisher 63 LT 465 ***(refd)***
Cain v. Moon [1896] 2 QB 283 ***(refd)***
Choo Ah Pat v. Chow Yee Wah [1974] 1 MLJ 62 ***(refd)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 2 MLJ 165 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Fulton v. Andrew LR [1875] LR 7 HL 448 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2001] 2 MLJ 70 HC ***(refd)***
Gordhandas v. Bai Suraj AIR [1921] Bom 193 ***(refd)***
Jones v. Lock [1865] 1 Ch App 25 ***(refd)***
Kameswara Rao v. Suryaprakasarao AIR [1962] AP 178 ***(refd)***
Kishan Singh v. Nichhattar Singh AIR [1983] P & H 373 ***(refd)***
Lutchman Ramcoomarsingh v. The Administrator General (Privy Council Appeal No 13 of 2001) (Unreported) ***(refd)***
Mahendran v. Arumuganathan [1999] 2 SLR 579 ***(refd)***
Milroy v. Lord [1862] 45 ER 1185 ***(refd)***
Motibai Hormusjee v. Jamsetjee AIR [1924] PC 28 ***(refd)***
Muniandy & Ors v. PP [1966] 1 MLJ 257 ***(refd)***
Newton v. Ricketts [1861] 11 ER 731 ***(refd)***
Ratna Ammal v. Tan Chow Soo [1966] 2 MLJ 294 ***(refd)***
Rex v. Low Toh Cheng [1941] MLJ 1 ***(refd)***

Riggs v. Palmer [1889] 115 NY 506 ***(refd)***
State of Rajasthan v. Hanuman AIR [2001] SC 282 ***(refd)***
Surendra Pal v. Saraswati Arora AIR [1974] SC 1999 ***(refd)***
Tek Chand v. Dile Ram AIR [2001] SC 905 ***(refd)***
Teng Kum Seng v. PP [1960] MLJ 225 ***(refd)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***
Tyrell v. Painton [1894] P 151 ***(refd)***
Udham Singh v. Indar Kaur [1971] 2 MLJ 263 ***(refd)***
Waring v. Waring [1848] 13 ER 715 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Other source(s) referred to:
Scott, *The Law of Trusts,* 4th edn, p 94
Theobald on Wills, 15th edn, p 32

For the appellants - Cecil Abraham (Tommy Thomas, Robert Lazar & Gopal Sreenevasan); M/s Sivanathan
For the respondents - Dr Cyrus Das (S Nantha Balan & Trevor George); M/s Shook Lin & Bok

[Appeal from High Court, Melaka; Civil Suit No: 22-58-1997]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

This appeal concerns the validity of a will. The arguments before us took 12 days. The appeal was argued with thoroughness that is rarely seen at the Bar these days. In fact, many of the authorities referred to in this judgment are those cited by counsel to us. We would therefore at the very outset express our gratitude to counsel for their assistance and in particular to both Mr. T. Thomas and Dato' (Dr.) Cyrus Das for having taken us through the evidence and the judgment under appeal with a fine-tooth comb. Their assistance has made our task that much lighter.

It is manifestly clear that this appeal raises no new question of law at all. Indeed, counsel on both sides rely on the same well established principles of law. Counsel for both sides are also agreed that this appeal turns on the peculiar facts of this case. Where they are in disagreement is whether this is an appropriate case for appellate intervention given that it turns on questions of fact. The respondents say that the instant appeal falls within the general rule of appellate non-interference. On the other hand the appellants say that this is

an appropriate case for appellate interference although it involves only questions of fact. We therefore have to decide whether this is a case where the trial court was plainly wrong in its appreciation of the facts and evidence.

The Narrative

Mr. Gan Puay Chee was a self-made man. He came to this country from China at the tender age of 9. He came empty handed. He spoke only Hokkien. Yet, when he died on 1 May 1997, at the age of 82 – a victim of cancer – he left behind a huge fortune accumulated by his own exertions and business acumen. We are told that his estate is worth several hundreds of millions of ringgit. There is now hotly contested litigation over it. This appeal arises from that litigation.

The deceased – for that is what we will call old Mr. Gan – had five children by his wife who had pre-deceased him. There were three daughters and two sons. One of the daughters was given away in adoption. A son was adopted. Of the remaining two daughters, one emigrated to Australia. The other stayed on in Melaka. Although she lived in her own home with her family she frequently visited her father. Both daughters are married and settled with families of their own.

By the account of those who knew him well, the deceased was a frugal man. He was tight-fisted. He had a strong personality. He was careful about his affairs. He always had a positive outlook on life. He was a private person. So, when it came to his health he was reluctant to discuss any problems he had. At one stage, he experienced difficulty in swallowing. But it was only upon the insistence of his family that he disclosed this. When he was medically examined it was found that he was suffering from cancer of an aggressive nature.

During his lifetime the deceased appears to have conducted himself in the manner of a feudal head of a joint family. That joint family comprised of the deceased, his sons, their wives and their children all of whom either lived with him or depended on him for their livelihood. His sons, particularly his eldest son (the second defendant) who lived with him, were treated by him more as his employees than his children. His wife ran the joint family household until her death. After that, in true feudal style, the deceased handed the entire running of that household to his eldest daughter-in-law (DW7), the second defendant's wife. In other words, DW7 succeeded her mother-in-law as the female head of the joint family household. The deceased placed implicit trust in her. He trusted her to the extent that she held the keys to the safe in which he kept his valuables and important documents. However, he was fond of his daughters (the plaintiffs), especially the daughter in Australia (the first plaintiff).

In 1993, the deceased had a fall at home and was confined to a wheelchair. When the state of his physical health declined, the deceased stopped going to his office to conduct business. Instead he worked from his home. Cheques requiring his signature and correspondence requiring his attention were brought to him at his home by DW12 who took care of the correspondence and managed the accounts of the companies in which the deceased had an interest. He also had the services of a male nurse (the fifth defendant) whom he had known for some 30 years. The fifth defendant looked after the deceased throughout the latter's illness. He was paid a pittance by the deceased for this service.

In December 1996 the deceased wanted to make a will. He expressed this intention to his usual solicitor, Mr. Andrew Goh (PW1) at a meeting they had in that month. Not long after this meeting, DW12 visited PW1 at his office. He brought along and handed to PW 1 a photocopy of the deceased's identity card (exh. P 46) and that of his late wife (exh. P47) as well as her death certificate (exh. P48). Later, the deceased telephoned PW 1 and asked him to call at the former's home. PW1 agreed to call on the deceased the following day, but he forgot about this and did not keep the appointment.

All the deceased's children were devoted to him. This is evidenced by the fact that whenever the deceased took a turn for the worse while he was at home the children telephoned the deceased's personal physician, Dr. Goh Tiong Peng (DW1) and asked him to make a house-call.

On 8 April 1997 the deceased was admitted into the Ayer Keroh hospital. He was given an intravenous drip. He was also given a blood transfusion. He was discharged from hospital on 11 April 1997 and went home where he remained until 25 April 1997, on which date he was re-admitted to the same hospital. That was his last illness, for he died on 1 May 1997.

A few days after his death a will surfaced. From the face of that document it appears to have been made by the deceased on 16 April 1997. The will made certain general and specific gifts. The deceased's two daughters were named beneficiaries who were each to receive specific legacies. But the daughters were unhappy with the will. They brought an action to have it declared invalid on several grounds. They also sought to set aside an alleged gift inter vivos of certain shares belonging to the deceased. The original sole defendant to the action was the executor of the will. Later, the other beneficiaries named in the will, apart, of course, from the two plaintiffs, were added as co-defendants on their application to intervene. These defendants are sons and the male nurse (DW12) who was cited as the fifth defendant.

After the exchange of pleadings and the completion of pre-trial steps, the trial of the suit commenced before Augustine Paul J. Two witnesses gave evidence before that learned judge. One witness (PW1) completed his evidence. The other,

DW2 (Teoh Ming) is the lawyer whose signature appears on the will as one of two attesting witnesses. She gave her evidence in chief and part of her evidence in cross examination before Augustine Paul J. The remainder of her evidence was given before the learned judicial commissioner who succeeded Augustine Paul J after the latter's transfer to Kuala Lumpur.

The trial before the High Court took several days spread over four years. After hearing closing speeches, the learned judicial commissioner in a reserved judgment found for the plaintiffs on all issues. He struck down the will. He declared the inter vivos gifts invalid. The relief he granted appears in the concluding paragraphs of his judgment. It is reported in [2001] 2 MLJ 70. Hence we find it unnecessary to repeat them. The defendants now appeal to us against those findings.

The Respective Cases

The plaintiffs' case was that the deceased's alleged will was bad because: (i) it was a forgery; (ii) the deceased lacked testamentary capacity; (iii) there were suspicious circumstances surrounding the making of the will.

The defendants' case in answer to the plaintiffs' was (i) that the will was the true, genuine and last will and testament of the deceased; (ii) that it was prepared on the instructions of the deceased, explained to him, signed by him before DW2 and her clerk DW3; (iii) that the deceased had the requisite testamentary capacity to make the will; (iv) that the suspicious circumstances, if any, surrounding the making of the will and relied on by the plaintiffs had been sufficiently dispelled.

The learned judicial commissioner dealt with all these issues in his judgment. He first held that the will was a forgery. He next held that the deceased did not have a sound disposing mind. Lastly, he held that there were suspicious circumstances surrounding the making of the will.

Before dealing with what we consider to be the central issue in this case, there are two matters relevant to the present appeal that need be addressed. These are, first, the burden of proof on each party in a case where the validity of a will is challenged and second the principles upon which an appellate court acts.

The Burden Of Proof

It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will – in this case the plaintiffs.

In *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263, the former Federal Court explained what is meant by "testamentary capacity" and dealt with the question of onus of proof of that element as follows (at p. 264):

> In the event, the learned judge pronounced in favour of the will as he decided that the plaintiff had failed to discharge the onus of establishing testamentary incapacity on the part of the testator.
>
> In this appeal, the appellant was correct in his submission that the judge was wrong in placing such an onus on the plaintiff. The plaintiff by his pleadings had clearly raised the issue as to testamentary capacity. A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Banks v. Goodfellow* [1870] LR 5 QB 565). Once this point was taken, it is clear law that the burden of proving testamentary capacity rested on the defendant. (See *Smee v. Smee* [1879] 5 PD 84 at p 91). There was therefore a misdirection on the part of the judge in putting the burden of proving testamentary incapacity in the first instance on the appellant.

In *Waring v. Waring* [1848] 13 ER 715, 720 Lord Brougham explained how the burden of proof in testamentary cases may shift from one party to the other. He said:

> The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor anything be less profitable as a guide to our ultimate judgment, than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a latter Will, undertakes to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, (the party propounding choose to rest satisfied with his *prima facie* case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again.

In *Bankim Bihari v. Matangini Dasi* AIR [1919] PC 157, Sir John Edge explained what the propounder of a will must establish. He said:

> It was for the appellant to establish the mental capacity of the testator, **that he understood the dispositions of the will, and that it was duly executed by him as his will.** (emphasis added.)

In *Barry v. Butlin* [1838] 12 ER 1089, the Privy Council, speaking through Parke B, laid down the two rules governing the nature of the onus of proof placed upon a party propounding a will:

> These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

In the leading case of *Tyrell v. Painton* [1894] P 151, 157, Lindley LJ after referring to the two rules laid down in *Barry v. Butlin (supra)* and to the cases of *Fulton v. Andrew LR* [1875] LR 7 HL 448 and *Brown v. Fisher* 63 LT 465 said:

> The rule in *Barry v. Butlin*, *Fulton v. Andrew*, and *Brown v. Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, **and to prove affirmatively that the testator knew and approved of the contents of the document,** and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. (emphasis added.)

As recently as 16 December 2002, the Judicial Committee of the Privy Council had occasion to consider the issue of the nature of the onus upon a propounder of a will to dispel suspicious circumstances. In *Lutchman Ramcoomarsingh v. The Administrator General* (Unreported, Privy Council Appeal No. 13 of 2001), an appeal from the Court of Appeal of Trinidad and Tobago, the Board in its advice delivered by Lord Slynn of Hadley said:

> In *Tyrell v. Painton* [1894] p 151 at 157, Lindley LJ said that where circumstances exist which excite suspicion the onus is on the person propounding the will to prove that the testator 'knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the Will'.

> But as Lord Hatherley stressed in *Fulton v. Andrew* [1875] LR 7 HL 448, 469 there is no absolutely rigid rule that if a testator of competent mind has had his will read over to him that further inquiry is shut out but where that is done 'very strong evidence is required in opposition to it in order to set aside any instrument so executed'. As Lord Cairns LC put it, at p 463, the duty is to bring home to the mind of the testator the effect of his testamentary act.

A little later, Lord Slynn continued as follows:

> These authorities, and many others to which it is not necessary to make reference since they are on similar lines, make it clear that where a person is in a fiduciary relationship with another who is intending to make a will, that person if he prepares or is closely involved in the preparation of the will or informing the testator's intentions must if the will is challenged satisfy the court that the testator knew and understood what he was doing and that the will has given effect to his intentions. The possibility of undue influence leading to the provision of such a benefit for the person, whether a solicitor or not, but particularly a solicitor, must be ruled out. The simplest way of avoiding the conclusion that there has been such influence is to ensure that an independent legal adviser is consulted by the testator or at any rate to give a clear and recorded opinion that such advice be obtained. But the statement in *Rhodes v. Bate* [1886] 1 Ch App 252, 257 upon which Permanand JA relies that the persons by whom the benefits have been conferred must be shown to have 'had competent and independent advice in conferring them' goes too far. It is simple and conclusive **but other methods showing that the will contains the intention of the testator and that he knew and understood what he was doing may be sufficient to remove the suspicions which have arisen.** (emphasis added.)

To sum-up, the effect of the authorities on the subject is that while the onus lies on the propounder of a will to dispel any suspicious circumstances surrounding the making of the will, that burden may be discharged by showing that the testator being of competent mind had his will read over to him *(Fulton v. Andrew (supra))* or that the testator knew and approved of the contents of the will *(Tyrell v. Painton (supra))*. One method of dispelling suspicious circumstances where there is a substantial gift to a person who either prepares or is closely involved in the preparation of a will is to show that the testator had obtained independent legal advice. Alternatively, the propounder may by other methods show that the will contains the intention of the testator and that he knew and understood what he was doing and in this way sufficiently remove any suspicions which may have arisen *(Lutchman Ramcoomarsingh v. The Administrator General (supra)).*

Principles Of Appellate Intervention

Very recently, this Court in *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 CA, reviewed some of the leading authorities on appellate intervention and identified the general rule of appellate non-interference. We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we there said. Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses. On appeal, the Federal Court reversed his finding of fraud. Chang Min Tat FJ said:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.

> **Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case**. Plausibility should never be mistaken for veracity. (emphasis added.)

In *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257, the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. *The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.* (emphasis added.)

The case of *Dr Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153 provides a clear illustration of a case where an appellate court (in that case the Federal Court) intervenes purely on the ground that there is absent any or any sufficient judicial appreciation of conflicting oral testimony. That case (like the present) concerned a challenge to the validity of a will. The trial judge had pronounced in favour of the will. It was a case that turned on a question of fact based on the credibility of oral testimony. Nevertheless, on appeal, the Federal Court reversed. The case of *Muniandy v. Public Prosecutor (supra)* was cited and applied as was the following passage in the judgment of Edgar Joseph Jr. SCJ in *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376:

> We recognized that the learned trial judge had a great advantage denied to this court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities (see for example, *Khoo Sit Hoh & Ors v. Lim Thean Tong* [1912] AC 323). An appellate court can, therefore, in appropriate cases act upon its own view of the conflicting evidence (see *Coghlan v. Cumberland* [1898] 1 Ch 704 and *Bigsby v. Dickinson* [1876] 4 Ch D 24).
>
> In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were

satisfied that he had not taken proper advantage of his having seen and heard witnesses (per Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

In *Dr Shanmuganathan v. Periasamy s/o Sithambaram Pillai* the Federal Court when setting aside the judgment of the High Court said (per Anuar CJ (Malaya)):

The plaintiff effectively rebutted DW1's evidence by producing exh. P15, the very letter which was supposed to have been returned undelivered. The learned judge failed to appreciate this crucial evidence and see the inconsistency in the evidence, or take account all the probabilities. In any event, His Lordship failed to give proper weight and draw proper inference from this. As observed by Ong Hock Thye FJ (as he then was) in *Muniandy & Ors v. PP*, the judge's appraisal of the witness must necessarily lose its value.

Rex v. Low Toh Cheng [1941] MLJ 1, is an example of a case where reliance purely on the demeanour of a witness by a trier of fact may be inconclusive upon appeal. In that case a magistrate who had acquitted an accused based his decision purely on his observation of the demeanour of witnesses. Terrell Ag. CJ said:

[A] Magistrate is entitled to disbelieve a witness and usually gives reasons for the opinion which he has formed, *but a general reference to the demeanour of witnesses, without condescending to any particulars, gives rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities,* and which could not be supported on a detailed examination of the evidence. (emphasis added.)

In *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110, the Sessions Court accepted the complainant as a witness of truth acting purely on demeanour. The High Court reversed mainly because the trial court had not judicially appreciated the evidence of the witness. In particular, the trial court had not considered the issue of motive. Raja Azlan Shah FJ there said:

The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v. Public Prosecutor* [1949] MLJ 88, 89 in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He

> saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive.

In the earlier case of *Ratna Ammal v. Tan Chow Soo* [1966] 2 MLJ 294, 298 the same learned judge (whose judgment was restored with approval by the Privy Council) referred to motive as an element in the appreciation of oral evidence as follows:

> In estimating what weight to be attached to DW2's evidence regard must be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of his evidence and in particular to the question whether or not he had any motive to conceal or misrepresent the facts.

In *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165, the trial judge had arrived at a findings of facts based purely on the credibility of the witnesses he had seen and heard. The Court of Appeal of Singapore reversed his finding. On further appeal to the Privy Council the judgment of the Court of Appeal was upheld. Lord Roskill said (at p. 168):

> Their Lordships do not find it surprising that the Court of Appeal not only felt obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding 'entirely on the credibility or otherwise of the witnesses testifying before him' the learned judge was guilty of 'a plain misdirection'. Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at 'without an adequate scrutiny and consideration of all the evidence before him'.
>
> Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error results in serious injustice.

In *Armagas Ltd v. Mundogas SA ("The Ocean Frost")* [1985] 1 LIR. 1, the English Court of Appeal reversed a finding of fraud made by the trial judge in that case on the ground that there had been no judicial appreciation of the evidence. Robert Goff LJ (later Lord Goff of Chieveley) said (at p. 57):

> Furthermore it is implicit in the statement of Lord MacMillan in *Powell v. Streatham Manor Nursing Home* [1935] AC 243, at p. 256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. *It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.* I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case. (emphasis added.)

In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involves, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle. But we find it sufficient to quote from two recent decisions on the point.

In *State of Rajasthan v. Hanuman* AIR [2001] SC 282, 284, Mohapatra J, delivering the judgment of the Supreme Court of India held that:

> [An] appellate Court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial Court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. **The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.** (emphasis added.)

In *Tek Chand v. Dile Ram* AIR [2001] SC 905, the judgment of a strong Bench of the Indian Supreme Court (Dr. A.S. Anand CJ, RC Lohati and Shivaraj Patil JJ) was delivered by Shivaraj Patil J, who said (at p. 916):

> No doubt, an appeal Court will be slow in disturbing a finding of fact recorded by the trial Court based on proper appreciation of evidence but it is also the duty of the appellate Court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of law laid down by this Court. More so when there is non consideration of material evidence and appreciation of evidence is not objective and one sided.

It is with the foregoing principles in mind that we now turn to address the central question in this appeal, namely whether the learned judicial commissioner was correct in deciding that the deceased's will was invalid.

Validity Of The Will

(A) Testamentary Capacity: The Law

It is settled law that for a will to be valid a testator must have testamentary capacity. And, as we have already said, it is for the defendants here, as propounders of the will to satisfy the court that the deceased had testamentary capacity at the material time.

As to what is meant by testamentary capacity, our courts have always accepted the following statement by Cockburn CJ in *Banks v. Goodfellow* [1870] LR 5 QB 549 as representing the law on the subject. First, at p. 565 of the report:

> It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no **disorder of the mind** shall poison his affections pervert his sense of right, or prevent the exercise of his natural faculties – that no **insane delusion** shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. (emphasis added.)

It may thus be seen that what the law primarily looks for as vitiating testamentary capacity is mental disorder or insane delusion. Mere bodily ill-health or imperfect memory is insufficient. That comes across again from the judgment of Cockburn CJ in *Banks v. Goodfellow (supra)*:

> In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; **the latter part may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of.**
>
> ...
>
> But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many

> of the ordinary transactions of life. **He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will.** This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it in writing. (emphasis added.)

Thus it may be seen that testamentary capacity is not to be equated with contractual capacity. A person may lack the mental capacity to enter into a contract and yet may have sufficient testamentary capacity.

It was submitted by counsel for the defendants that the relevant and material point of time at which the mental capacity of the deceased falls to be determined is the time at which the will was made and not at some other earlier or later point of time. We agree. The submission of counsel is supported by abundant authority.

In *Billinghurst v. Vickers* [1810] ER 956, 958, Sir John Nicholl said:

> The Court must take a cautious view in deciding questions of law and fact; it, is an established principle that, where capacity is doubtful at the time of execution, there must be proof of instructions or of reading over; …

We note that *Billinghurst v. Vickers* was approved by the Privy Council in *Barry v. Butlin (supra).*

In *Choo Ah Pat v. Chow Yee Wah* [1974] 1 MLJ 62, 67, Abdul Hamid J (as his Lordship then was) laid down the principle in abundantly clear terms. He said:

> It is also Mr. Joginder Singh's contention that the proposition has equal application to gifts made by a person of unsound mind and a disposition made by such person is absolutely void. The court need not, I think, at this point, concern itself with the effect of the disposition. Having found that the presumption does not arise, the burden therefore, rests on the plaintiff to show that deceased was of unsound mind **at the time when he made the disposition.** (emphasis added.)

In *Mahendran v. Arumuganathan* [1999] 2 SLR 579, 586, the Singapore Court of Appeal whose judgment was delivered by Karthigesu JA, made the same point:

> Translating the above stated principles to the facts and circumstances of this case, it is for Arumuganathan, the respondent, to whom we will refer as the 'propounder'(where the context is appropriate) **to prove to the satisfaction of the court that Mrs Ramanathan had the testamentary or mental capacity to make a will on 28 July 1993** (being the date of the will in that case); … (emphasis added.)

Lastly, in *Theobald on Wills*, 15th edn, at p. 32 it is stated that "the testator must have testamentary capacity at the time he executes the will." *Banks v. Goodfellow (supra)* is cited in the footnote as authority for this proposition.

We now turn to apply these principles to the facts of the present case.

(B) Testamentary Capacity: The Facts

The facts relevant to the mental capacity of the deceased at the material time as adduced are as follows.

In February 1997 the deceased was diagnosed with cancer of the mid-oesophagus. It was non-operable. And it was of an aggressive nature. The physical health of the deceased took a turn for the worse. He was in and out of hospital from March 1997 until his demise. But his mind was certainly lucid. That much is clear from the evidence of his personal physician, DW1, who testified that he did not at any one time before the deceased's death fail to have a meaningful conversation with the deceased. Neither did the deceased give any irrational answers to DW1 during the month of April 1997. In fact no witness testified positively that the deceased lacked the requisite mental capacity to make a will at the time the will was made on 16 April 1997. On the contrary, as will be seen, all the available evidence at trial was to the opposite effect.

Yet the learned judicial commissioner seems to have come to the conclusion that the deceased was not of sound mind at the time of making of the will. We say "seems" advisedly because, as pointed out by Mr Abraham and Mr Thomas of counsel for the defendants before us (but who did not appear in the court below), there does not appear to be any clear or specific finding by the learned judicial commissioner that the deceased was in fact of unsound mind at the date of the will. The finding the learned judicial commissioner made is as follows:

> Kalaulah diterima bahawa simati 'mentally alert' maka saya percaya simati tidak akan melantik D1 sebagai wasi dan pemegang amanah tunggal apabila diingati tentang nasihatnya kepada Plaintif-Pertama supaya sentiasa mengadakan dua orang wasi dan pemegang amanah.
>
> Saya bersetuju dengan yang dikatakan oleh Privy Council dalam kes Battan Singh di m.s. 172, para akhir 'the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of the execution and that the disposition of his property under it was the outcome of delusion … The will is therefore invalid.'

In the English translation of the judgment provided to us the foregoing passage reads as follows:

If it was accepted that the deceased was mentally alert then I believe the deceased would not have appointed D1 as the sole executor and trustee if one is to remember his advice to the 1st Plaintiff to always ensure that two executors and trustees are appointed.

> I agree with what was stated by the Privy Council in the Battan Singh case (*Battan Singh v. Amirchand* [1948] AC 161] at page 172, last paragraph '... the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of the execution and that the disposition of his property under it was the outcome of delusion ... the will is therefore invalid.'

We agree with counsel that the foregoing passage (whether in Bahasa Malaysia or its English translation) does not constitute a clear or specific finding of a lack of testamentary capacity on the part of the deceased. That said, however, we are prepared to accept that the foregoing passage in the judgment may be interpreted as containing a finding by the learned judicial commissioner that the deceased was so enfeebled by disease as to be without sound mind or memory at the time he executed the will. The issue here is whether he was right in making that finding.

As we have said earlier, there was not a shred of evidence to show that the deceased lacked the mental capacity to make a will. We have had the evidence of the relevant witnesses (in particular DW1) on the point read over to us several times during argument. There is not a shred of evidence, medical or otherwise to show that the deceased lacked testamentary capacity on 16 April 1997. Accordingly, the finding by the learned judicial commissioner against the validity of the will on the ground of the deceased's alleged mental incapacity was based on no evidence and cannot stand. Further, a close reading of the judgment of the learned judicial commissioner shows that his finding of the lack of mental capacity based on the available medical evidence was a matter of pure speculation and conjecture. At the risk of repetition, we emphasise that the medical evidence does not support a conclusion that the deceased suffered from unsoundness of mind at any time, in particular at the date of the will.

It follows that the learned judge's conclusion on the mental state of the deceased both as to its nature and as to the time of its alleged existence is plainly wrong and constitutes a serious misdirection that has occasioned a miscarriage of justice.

(C) Due Execution

We now turn to consider the issue as to whether there was due execution of the will by the deceased. The learned judicial commissioner found against the defendants on this point on two main grounds. First, he found that the signature on the will was not the deceased's and therefore a forgery. Second, he found

that there had been only one attesting witness present when execution took place and that therefore there was non-compliance with the relevant provisions of the Wills Act.

The defendants complain that these findings were arrived at without any or any proper judicial appreciation of the evidence by the learned judicial commissioner. The plaintiffs say that there was such appreciation. The question we therefore have to decide is whether there was judicial appreciation of the relevant evidence on the points that lie on the axis of the dispute between the parties. This necessitates a review of the facts and evidence.

The defendants called several witnesses to show that the will was indeed that of the deceased. The most important of these were DW2, the solicitor and her clerk (DW3) who attended to the preparation and the attestation of the will. And a brief summary of the explanation given by the material witnesses called during the defendants' case as to how the will came about is as follows.

The deceased was admitted to the Ayer Keroh Hospital on 8 April 1997. On 10 April 1997, the first defendant visited the deceased in hospital. According to the first defendant (DW6), during that visit the deceased had asked the first defendant to make arrangements for him (the deceased) to see a lawyer because he wanted to make his will. The deceased then handed the first defendant a photocopy of his identity card. The first defendant then went to see his lawyer (DW2). He handed her the photocopy of the deceased's identity card. On the morning of 16 April 1997, pursuant to arrangements that had previously been made by the first defendant, DW2 accompanied the first defendant to the deceased's home. There, DW2 received instructions from the deceased to prepare a will. The instructions were given in Hokkien. DW3 then returned to her office and instructed DW4 to prepare the deceased's will in draft. After preparing the will, DW2 and DW3 proceeded to the deceased's residence. There, DW2 read out and explained the will to the deceased in the Hokkien dialect. The deceased understood the contents of the will and he signed it. DW2 and DW3 then attested the will in the presence of the deceased and in each other's presence. The will was then handed to the first defendant. On 11 May 1997, after the deceased had passed away, there was a gathering of the deceased's family members at which the will was read by DW2. After the reading, PW3 (the second plaintiff's husband) asked for a copy of the will. The following day, PW3's son called at DW2's office and collected a copy of the will.

In his judgment, the learned judicial commissioner's approach to the evidence of DW2 is based purely upon what had allegedly transpired at the reading of the will on 11 May 1997. This is what is supposed to have happened on 11 May 1997. According to PW3, he asked DW2 as to who had witnessed the

will. DW2 is alleged to have said that it was DW3 who witnessed the will. PW3 further testified that DW2 did not say that she had witnessed the will. The point sought to be made by this witness is that DW2 had not witnessed the will, a suggestion DW2 denied in her evidence.

Returning to the learned judicial commissioner's judgment, this is how he dealt with DW2's evidence:

> Di dalam keterangannya di mahkamah, DW2, peguam yang menyediakan wasiat berkenaan, berkata:
>
> > My signature was in the presence of the deceased, the first defendant and Miss Chan. Ms Chan was the attesting witness.
>
> Sementara PW3, di dalam pemeriksaan utamanya berkata:
>
> > The witness (who will be questioned) was witnessed by the clerk. Teo Meng ('DW2') did not say she witness the execution of the will …
>
> DW2 juga di dalam pemeriksaan balas berkata:
>
> > I do not agree to the suggestion that Chan ('DW3') was a witness to the will. I do not think that I said that it was Mr Ong ('PW3') who asked me … Earlier I could not recall, but now I am sure. I reflected on the issue, and I am sure he did not ask the question.
>
> Berkaitan surat yang bertarikh 18 Julai 1997, ikatan F ms 97, DW2 berkata beliau ingat surat itu. Apabila dicadangkan adanya 'uncertainty', DW2 berkata '… today it is a definite no'.
>
> > Soalan: Do you agree, as a lawyer, that this suggests that you were not present when the will was executed?
> >
> > Jawapan: I agree it was a very important allegation.
> >
> > Soalan: If it were not true, any normal lawyer would deny it and leave it open.
> >
> > Jawapan: My lord, at that point of time I court not recall whether such a question was posed to me.
> >
> > Soalan: Is para 3 your answer that you were not present?
> >
> > Jawapan: Now I am very sure that there was no such question posed, nor did I answer that I was not present because I was present. It was more the question but upon recollection.
>
> PW3, suami kepada plaintif kedua yang hadir semasa wasiat dibaca, di dalam kenyataannya di mahkamah, berkata bahawa beliau telah bertanya kepada DW2 tentang wasiat itu. DW2 telah berkata bahawa DW2 menyediakan wasiat itu tetapi tidak mengatakan bahawa beliau telah menyaksikan wasiat berkenaan.

Plaintif kedua ('PW9') juga hadir semasa wasiat dibaca, dan di dalam keterangannya di mahkamah beliau berkata:

> Teo Ming ('DW2') did not say she witnessed the will. She said it was witnessed by the clerk.

PW9 mengesahkan bahawa terdapat perbincangan di antara DW2 dan PW3.

Keterangan PW3 dan PW9 berkait dengan apa yang berlaku pada 11 Mei 1997 di antara DW2 dan PW3 tidak dicabar sama sekali oleh pihak defendan. 'Their corroborative evidence stands unchallenged and unrebutted' kata peguam plaintif.

Saya dapati bahawa DW2 sebagai peguam tidak menjawab dengan berterus terang dan jelas soalan yang dikemukakan oleh peguam plaintif walaupun kepada saya, soalan-soalan itu menjadi soalan yang penting kepada kesahihan wasiat yang menjadi isu sama ada ia melanggar kehendak s 5(2) Akta tersebut tentang adanya dua orang saksi kepada wasiat."

The translation of the foregoing passage reads:

In her evidence in Court, DW2 the lawyer who prepared the said will, said:

> My signature was in the presence of the deceased, the 1st Defendant and Miss Chan. Miss Chan is the attesting witness.

On the other hand PW3 during the examination in chief stated:

> The witness (will questioned) was witnessed by the clerk. Teo Meng (DW2) did not say she witness the execution of the will.

DW2 during cross examination also stated:

> I do not agree the suggestion that Chan (DW3) was a witness to the will. I do not think that I said that it was Mr. Ong (PW3) who asked me ... Earlier I could not recall but now I am sure now. I reflected on the issue and I am sure he did not ask the question.

With regard to the letter dated 18.7.97, Bundle F, page 97, DW2 said she remembers the letter. When put to her that there was 'uncertainty' DW2 said '... to day it is a definite no'.

> Question: Do you agree as a lawyer that this suggest that you are not present when the will was executed?
>
> Answer: I agree it was a very important allegation.
>
> Question: If not true any normal lawyer would deny it and leave it open.

Answer: My lord, at that point in time I could not recall whether such question was posed to me.

Question: Para. 3 is your answer that you are not present.

Answer: Now I am very sure that there was no such question posed and nor did I answer that I was not present because I was present. It was more the question but upon recollection.

PW3, the 2nd Plaintiff's husband, who was present when the will was read, in his statement in Court said that he had asked DW2 about the will. DW2 said that DW2 prepared the will but did not say that she witnessed the said will.

The 2nd Plaintiff (PW9) was also present when the will was read, and in her evidence in Court she said:

Teo Ming (DW2) did not say she witnessed the will. She said it was witnessed by the clerk.

PW9 confirmed that there was a discussion between DW2 and PW3.

The evidence of PW3 and PW9 with regard to what occurred on 11.5.97 between DW2 and PW3 was not challenged at all by the defendants. 'Their corroborative evidence stands unchallenged and unrebutted,' said the Plaintiffs' counsel.

I find that DW2 as a lawyer did not truthfully and clearly answer questions posed by the Plaintiffs' counsel although to my mind these questions are questions that are vital to the validity of the will whereby the issue is whether it contravenes the requirements of Section 5(2) of the Wills Act, 1959 on there being 2 witnesses to a will."

In a later passage in his judgment, the learned judicial commissioner said:

Setelah mengambilkira perwatakan simati, keterangan-keterangan DW1, DW2, DW3, PW4, PW6 dan Plaintif-plaintif, saya memutuskan bahawa apa yang dikatakan wasiat simati adalah tidak sah.

The English translation reads:

After taking into account the deceased's character, the evidence of DW1, DW2, DW3, PW4, PW6 and the Plaintiffs, I hold that the alleged will is not valid.

Counsel on both sides took us through the evidence of DW2, DW3, PW3 and PW9 several times during argument. Counsel also invited us to subject the evidence of these and other relevant witnesses to microscopic scrutiny. We were also invited to read and re-read the judgment of the learned judicial commissioner as a whole. Having done all that was required of us we have

come to the conclusion that there is merit in the argument of Mr Thomas of counsel for the defendants that the learned judicial commissioner clearly failed to undertake a judicial appreciation of the evidence relating to the making of the will. Counsel demonstrated several instances where there has been a significant absence of a judicial appreciation of the evidence. However, we propose to deal only with the most important areas of the case.

First, the evidence of DW2 and DW3 which we have already summarised. Here, the learned judicial commissioner failed to apply the correct tests to determine the credibility of these two witnesses. He did not ask himself the crucial question: what motive did these two witnesses have to concoct the story about the making of the will by the deceased? Neither took an interest under the will. And as Mr. Thomas pointed out during argument, DW2's firm received the paltry sum of a little more than RM500 for preparing and attesting the deceased's will. As far as DW3 is concerned, she was merely a clerk in a firm of solicitors and there appears to be no motive whatsoever for her to fabricate the event concerning the execution of the will by the deceased.

Particularly, in the case of DW2, the learned judicial commissioner did not ask himself the critical question as to why this witness should tell a lie about both her visits to the deceased's home. He also failed to consider, whether as a lawyer of seven years practice she would have been prepared to place the long professional career that lay ahead of her at risk for a fee of a little more than RM500. It was suggested at the trial and before us by learned counsel for the plaintiffs that DW2 was in reality acting as the first defendant's solicitor rather than the deceased's solicitor in the matter of the preparation of the will. But no finding to that effect was ever made by the court below.

Still on the evidence of DW2, it is clear from the record that the finding by the learned judge that the "evidence of PW3 and PW9 with regard to what occurred on 11 May 1997 between DW2 and PW3 was not challenged at all by the defendants" (the emphasis is ours) cannot stand as it is a finding in the teeth of the evidence. For, the record of appeal shows the following exchange between Mr. Robert Lazar of counsel for the defendants and PW3:

> Put: You did not ask Teo Meng on the preparation and the witnessing of the will.
>
> Answer: I disagree.
>
> The question put to Teo Meng was in English. I also asked Teo Meng for a copy of the will.

Put: You only asked Teo Meng was whether she could give you a copy of the will.

Answer: I disagree.

During the question and answer, Teo Meng did not give me a calling card.

Thus it is clear that the relevant part of the defendants' case was indeed put to PW3. But it was not put to PW9 (the second plaintiff). Nevertheless, it was submitted both by Mr. Thomas and Mr. Lazar that it was not necessary to put the same questions to this witness as well. In support, counsel referred us to *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212, 213 where Raja Azlan Shah CJ (Malaya) said:

> Mr. Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120, 122 where Haslam J said at page 122:
>
> > In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where
> >
> > … the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, eg, to save time. **And where several witnesses are called to the same point it is not always necessary to cross-examine them all.**
>
> In our view, although there was a misdirection by the trial judge on this point it did not affect the correctness of the verdict as the totality of the evidence points conclusively to the guilt of the appellant. (emphasis added.)

As we have already said, the learned judicial commissioner's finding that PW3 was not challenged cannot stand in the light of the passage from the evidence we have quoted above. In respect of PW9, applying the case of *Wong Swee Chin v. Public Prosecutor (supra)* the learned commissioner's conclusion amounts to a serious misdirection of law. This is because he overlooked the fact that there was no obligation in law on counsel's part to put the same question to PW9 as he had put to PW3 in respect of the 11 May incident.

Mr. Thomas submitted that with regard to the incident of 11 May 1997, there was no judicial appreciation by the learned judicial commissioner of the evidence DW2 in two other important respects. First, counsel argued that the finding by the learned judicial commissioner (already quoted earlier) that DW2 "as a lawyer did not truthfully and clearly answer questions posed by the plaintiffs' counsel although to my mind these questions are questions that are vital to the validity of the will …" was based on a misunderstanding of the relevant facts. In order to properly appreciate counsel's argument, it is necessary to recite the relevant chronology in brief.

On 13 June 1997, that is to say, some two months after the reading of the will, the plaintiffs instructed solicitors who wrote to the first defendant alleging that the will in question was invalid. By a letter dated 20 June 1997, the first defendant's solicitors denied the invalidity of the will. Then, by a letter dated 11 July 1997, that is to say, some two months after the reading of the will, the plaintiffs, for the first time, mentioned the exchange that is alleged to have taken place between PW3 and DW2. The first defendant's solicitors then very properly put this letter of the plaintiffs to the firm in which DW2 was a partner and invited a response. In their reply dated 18 July 1997, DW2's firm stated, *inter alia*, as follows:

> 1) With regard to Paragraph 2 of the said letter, Miss Teoh Ming would reply that she attested the execution of the Will by Mr Gan Puay Chee @ Gan Chuan Lian on 16/4/1997 in the home of Mr Gan Puay Chee @ Gan Chuan Lian, deceased.
>
> 2) With regard to Paragraph 3 of the said letter Ms Teoh Ming would reply that **she does not recall** any query by a family member as to who were the witnesses who were present when the deceased executed the will nor does she recall replying that she was not present when the will was executed by the deceased.
>
> 3) With regard to Paragraph 6 of the said letter, as far as Miss Teoh Ming is concerned, the deceased executed the will (the original and duplicate) in her presence in his own hand. (emphasis added.)

It is the phrase to which we have lent emphasis that appears to have been the source of confusion in the court below and which led the commissioner into error. From the evidence on record, it is clear that, in essence, learned counsel for the plaintiffs, with complete propriety, suggested to DW2 during the latter's cross-examination that what the witness was prevaricating when she used the phrase "does not recall". The witness' response to this area of the cross-examination has already been produced under para. 65 of this judgment. As may be seen from the comment of the learned judicial commissioner presently under discussion, DW2's response to questions under cross-examination made an impression – a negative impression – on his mind about the veracity of DW2.

We recognise of course that it was the duty of learned counsel for the plaintiffs to pressure the witness under cross-examination into making a concession in respect of her response contained in her firm's letter. But, equally, it was the duty of the learned judicial commissioner not merely to focus on the answers given in cross-examination but also to hearken to the contents of the whole of the letter and to properly interpret so much of DW2's response in that letter that came under challenge in the course of cross-examination. The learned judicial commissioner, with respect, failed to do this and thereby fell into serious error in his appreciation of DW2's evidence.

In our judgment, if the learned judicial commissioner paid sufficient heed to the other paragraphs of the letter in question, he would have realised that there was indeed no prevarication at all on the part of DW2. For, twice in that letter she made it clear beyond any doubt that the deceased signed his will in her presence and that she did in fact attest that will. Further, the learned judicial commissioner did not judicially appreciate DW2's evidence by testing her answers given under cross-examination against the rest of her evidence and against the probabilities of the case. Had he done so he would have found that there was no concession by DW2 in para. 2 of her letter (quoted under para. 75 of this judgment) as contended by the plaintiffs.

When properly viewed, the gist of DW2's evidence is that at the time she made her written response she had no recollection of any such question as alleged by PW3 having been asked of her. Now, that is very different from saying that she had doubts about having given the alleged answer to PW3. Yet this important – indeed crucial – difference went unnoticed by the learned judicial commissioner.

In our judgment, when viewed objectively, the proper interpretation that the learned judicial commissioner ought to have placed upon DW2's evidence (in particular with reference to the paragraph under challenge in her letter) is that as far as she could recall such a question as alleged by PW3 had never been asked of her. Any other interpretation of her letter would run against what had

been stated in the other paragraphs of her letter and against the probabilities of the case. For she was certain in that letter that she was present and witnessed the deceased executing his will. She could not therefore, by any stretch of the imagination have meant at the same time that she was unsure of this fact.

We now turn to the failure of the learned judicial commissioner to test the evidence of DW2 against the probabilities of the case in the context of PW3's allegation about what had allegedly transpired at the reading of the will. To recall, it is the plaintiffs' case that DW2 literally admitted to PW3 at the reading of the will that DW3 was the sole witness to the deceased's signature on the will. Now, the question the learned judicial commissioner should have asked himself in relation to this part of the case is this. Would any lawyer in her right mind have openly and in the presence of witnesses admitted to such a serious charge as her absence at the signing of the will? When put in this way the implausibility of the allegation made against DW2 may be seen at once. But nowhere in the judgment under appeal has the learned judicial commissioner asked himself this vital question.

That brings us to the second complaint made by Mr. Thomas about the way in which the learned judicial commissioner approached the evidence concerning what had happened at the reading of the will on 11 May 1997.

It is apparent that the learned judicial commissioner accepted as Gospel PW3's and PW9's version of what had happened. Indeed, he accepted; and as has been seen wrongly accepted; the evidence of PW3 as having been unchallenged. Mr. Thomas argues that quite apart from the error into which the learned judicial commissioner fell in treating the evidence of PW3 and PW9 as unchallenged, he fell into the further error of failing to critically test their evidence, in particular from the point of view of any motive that they might have had to make the allegation.

It cannot be gainsaid that in the event of the plaintiffs' success in their action the deceased's estate would go into intestacy so that they and their immediate families would stand to gain a substantial bounty; sums very much larger than those under the will. Now, it is a common experience of mankind in general that greed and avarice for the wealth and property of others is a powerful motive. In some cases it has driven people to murder their relatives in order to gain an inheritance, as happened in *Riggs v. Palmer* [1889] 115 NY 506. But nowhere in the judgment under appeal is there the slightest reference to this important element thereby demonstrating that it never featured in the weighing scales that are used by a trier of fact to assess the weight to be assigned to particular evidence. In our view counsel is amply justified in the complaint he makes about the failure of the learned judicial commissioner to judicially appreciate the evidence of DW2. There was simply no evaluation at all.

Much, if not all that we have said applies equally to DW3. But in her case, apart from a cursory reference to her in the omnibus passage in the judgment under appeal (produced under para. 66 of this judgment) there is no separate treatment of her evidence. There is no reference to any motive she might have had to commit perjury. Nor is there even a hint of any ill-feeling she might have had against the plaintiffs. In her case, she was a pure stranger: an employee of a firm of solicitors who had prepared the will in question. In our judgment, the failure of the learned judicial commissioner altogether to evaluate the evidence of DW3 constitutes a serious misdirection.

Once the evidence of DW2 and DW3 is carefully scrutinised and tested against the probabilities of the case, it is apparent that they are wholly disinterested witnesses. Their evidence may be safely acted upon and ought to have been acted upon by the learned judicial commissioner. DW2 attended on the deceased, took his instructions, prepared a will in accordance with those instructions and attended to the execution and attestation of that will. DW2 and DW3, testified that the deceased was entirely lucid and mentally alert both at the time of giving instructions and at the time of signing the will. We find no good reason for these two witnesses to have concocted their story as neither of them had anything to gain from doing so. Their evidence puts paid to any suggestion of a lack of mental capacity on the part of the deceased at the time he signed his will.

In the context of the present discussion we would mention the case of *Gordhandas v. Bai Suraj* AIR [1921] Bom. 193. In that case, the testator died a few hours after making his will. His nephew applied for a grant of letters of administration with will annexed. His application was opposed by the testator's widow and her daughters. There was no dispute that the testator was very ill at the material time. However, there was evidence from the two pleaders (Shambuprasad and Bhailal) who drew up the will that the testator was in a state of consciousness when the will was drawn up and signed by him. And there was no evidence going the other way. The testator had, during his lifetime told his doctor that he was going to will his property away to charity. However, the will only made provision for the testator's widow, his daughters and his nephews. The judge at first instance held against the validity of the will. The nephew appealed.

In reversing the judgment of the trial judge, Macleod CJ first dealt with the evidence of the two pleaders as follows:

> Then he [the trial judge] has cast certain aspersions on the two pleader witnesses who were responsible for; the drawing up of the will see nothing in their evidence to cast suspicion on their *bona fides*. The judge says that both the pleaders; undertook a task to which they had never set themselves before and the result has been a most incomplete and an imperfect document.

> I have 'read the will. As far as I can see, considering the circumstances of the case, it reflects great credit on Shambuprasad who took the main part in writing it.

His lordship then went on to say as follows:

> Then reliance was placed upon certain discrepancies in the evidence of Shambuprasad and Bhailal. But they may have taken different views at one time or another of the condition of the testator, and I see no reason why their evidence should not be believed together with the evidence of the Doctor on the main point that the testator, although he was ill, was able to understand what he was doing. *It is well settled now that it need not be proved that a testator, in order that his will may be found good by a Court, was in a perfect state of health, or that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of, and was able, when the result of the lawyer's efforts was read out to him, to understand that his instructions in the main had been complied with.* I see nothing in the evidence which would lead me to suppose that the testator was not able to give instructions which were embodied in the will, and when it was read over to him to understand that those instructions had been given effect to. The learned Judge seems to have been obsessed with the idea that the testator's main intention was to dispose of his estate in charity that therefore, the disposal of the estate according to the manner appearing in the will was contrary to the testator's intentions. But I see no reason to come to any conclusion of that sort. (emphasis added.)

As in *Gordhandas v. Bai Suraj (supra)*, in the instant appeal all the evidence as to the deceased's mental capacity flows only in one direction. There is no evidence going the other way. The evidence of the deceased's personal doctor of many years established that the deceased was in a sound mental state at all times material to the litigation herein. It is our judgment that based on the facts and circumstances of the present instance, it has been satisfactorily proved that the deceased was able to give instructions as to the manner in which his estate was to be disposed of, and was able, when the result of DW2's efforts was read out to him, to understand that his instructions had been complied with.

There is one further point. Unlike *Gordhandas v. Bai Suraj (supra)*, the deceased in the instant appeal did not die a few hours after making his will. He lived on for several days during which he had a conversation with DW1 in the course of which he mentioned that he had not tied up some loose ends; but he did not mention having made his will. Given that the deceased was a secretive person it comes as no surprise that he did not mention the will. What is of much greater significance is that if the deceased had been unhappy with the terms of the will or with DW2, he had ample opportunity to revoke the

will or to complain about it to any number of persons, including the second plaintiff or even DW1. The fact that he did not do so is consistent with the probability that he was satisfied with and had acquiesced in the terms of the will. However, this point was never considered by the learned judicial commissioner in his judgment. It is therefore our view that the learned judicial commissioner fell into error when he held that the deceased's will was invalid.

The deceased was of course not in a state of perfect health because he was suffering from terminal cancer. But on the authorities, perfect health is not a *sine qua non* of testamentary capacity. In *Kishan Singh v. Nichhattar Singh* AIR [1983] P&H 373, for example, a deaf and dumb person who was suffering from cancer of his back and head made a will. It was held that:

> the mere fact that the deceased was having cancer of the back did not mean that he was not in a fit mental condition to make the will. A testator of a will does not have to be found to be in a perfect state of health to have his will declared valid. The only criterion is that the testator was capable of understanding the nature of his act, which was fully proved in this case. Further, the mere fact that the propounder of the will was present at the time of the execution of the will alone is not sufficient to doubt the genuineness of the will.

So too here. The mere fact that the deceased was seriously ill with cancer or that the first defendant being the propounder of the will was present at the execution of the will by the deceased does not in our judgment throw any doubt on the validity of the will. In the present instance there is ample evidence, already adverted to, which supports a finding in favour of the validity of the will.

Mr. Thomas submitted that there is evidence apart from that of DW1, DW2 and DW3 that the deceased was *compos mentis* and able to deal with his affairs on 16 April 1997, that is to say, on the day that the will was executed. In this context counsel drew our attention to the evidence of DW12 to whom we referred very early in this judgment. The gist of DW12's evidence is that he prepared cheques and brought them to the deceased for the latter's signature. This witness produced several cheques which he said were signed by the deceased. Among the cheques he produced were exhs. D28, D29 and D30 all dated 16 April 1997.

The plaintiffs did not accept that the dates and signatures appearing on D28, D29 and D30 as genuine. It was put to DW12 that the cheques were undated when signed. This suggestion was denied by the witness. Also denied by the witness was a suggestion that he had later dated the cheques to make it appear as though they had been signed on 16 April 1997.

The significance of the evidence of DW12 is quite obvious. If accepted, it destroys any suggestion of a lack of testamentary capacity on the part of the deceased. A man's ability to sign his cheques in order to make payments demonstrates his capacity to understand the nature and consequences of his acts. And if the deceased could do this on 16 April 1997, it is plain that he was certainly in a position to give instructions for a will, to understand the contents of his will when read and explained to him and to place his signature on it. The effect of such evidence is to corroborate DW2 and DW3 and simultaneously to destroy any suspicious circumstances surrounding the making of the will.

Now, we have scrutinised the judgment under appeal with care but we are unable to find any mention of DW12 or his evidence. There has simply been no appreciation at all of the importance of this witness' evidence. This failure of the learned judicial commissioner is in our view a non-direction amounting to a misdirection.

Mr. Thomas submitted that the suggestion by learned counsel for the plaintiffs that the cheques were undated when they were signed is against the probabilities of the case. Here it is to be noted that the learned judicial commissioner accepted the deceased to be a very careful man. Indeed, it is based on that very finding that the learned judicial commissioner drew adverse inferences against the defendants, particularly in the context of DW2 receiving the deceased's instructions for the will. But equally, the learned judicial commissioner should have asked himself the question: would the deceased as a careful man agree to sign undated cheques? When viewed in this way – as it indeed should be – it is clear that the plaintiffs' suggestion militates against the probabilities of the case. DW12's evidence is therefore entirely consistent with the probabilities of the case and it follows that the deceased was in full possession of his mental faculties when he gave the instructions to DW2 and later executed his will in the presence of DW2 and DW3.

What we have said thus far in relation to DW12's evidence is an instance where the trial court has adopted one approach to test the plaintiffs' case but yet omitted to adopt the same approach to test the defendants' case. In other words, there was no uniformity of approach to the facts and evidence and to the inferences that were to be drawn from them. Thus, the trial court was prepared to accept the mere ipse dixit of the second plaintiff and her husband as to what is supposed to have transpired at the reading of the will, without testing that allegation against the probabilities of the case. By contrast, when it came to DW12, the learned judicial commissioner completely omitted to consider his evidence although such evidence was consistent with the probabilities of the case and in favour of the defendants.

There is another instance which illustrates the point. It concerns the allegation of the absence of knowledge on the part of the deceased's sons, in particular, the second defendant about the deceased making a will. On this point the learned judicial commissioner refused to accept the evidence of the defendants' and their witnesses as being improbable, principally because the first defendant was the second defendant's close friend so that it was likely that the second defendant would have been told by the first defendant of the existence of the will. However, the learned judicial commissioner failed to test the same evidence against the fact, as found by him, that the deceased was secretive and treated his sons more like employees and kept them in fear of him. Accordingly, the learned judicial commissioner omitted to take these additional facts into account when drawing the appropriate inference. In particular he failed to ask himself the question: given the additional facts, is it improbable that the second defendant was unaware of the deceased's will? Having done so, it was then necessary for him to weigh the two probabilities in the judicial balance before deciding which of the two conclusions was more probable. That in effect is meant by the expression "balance of probabilities". In the present case there was no such exercise despite a sustained oral and written submission by Mr. Robert Lazar on the point. We are therefore left with the impression that while the evidence for the defendants was subjected to the acid test of probability, the plaintiffs' evidence was viewed with an over-indulgent eye.

It is a well established principle of the judicial appreciation of evidence that the same test should be applied to both the evidence of the plaintiff and the defendant. In other words, there must be uniformity of approach. In the present case we are satisfied that there was a duality of approach by the learned judicial commissioner and that it has occasioned a miscarriage of justice.

We now turn to the next area of complaint regarding the trial court's failure to undertake a judicial appreciation of the evidence. It is clear from the judgment that the learned judicial commissioner held the deceased's will to be a forgery by accepting in its entirety the evidence of the two handwriting witnesses called by the plaintiffs and rejecting the evidence of DW2 and DW3, both of whom are disinterested witnesses. This is how the learned judge expressed himself on the point:

> Dalam kes ini saya memutuskan bahawa tandatangan si mati di dalam apa yang dikatakan wasiat si mati bukanlah tandatangan si mati. Saya menerima sebab-sebab yang diberi oleh PW4 dan PW6. Kepada saya cara yang baik bagi menghadapi keterangan dari saksi-saksi pakar ini, adalah mendapatkan seorang saksi pakar yang lain yang dapat memberi pendapat yang menentang dan kegagalan defendan-defendan membawa saksi-saksi pakar mereka membawa padah kepada kes defendan-defendan.

> Setelah mengkaji keterangan semua saksi kesempurnaan fikiran si mati dan wataknya, dan juga keterangan pakar-pakar tulis tangan, saya memutuskan tanpa keraguan munasabah bahawa wasiat Gan Phay Chee @ Gan Chuan Lian bertarikh 16 April 1997 adalah suatu pemalsuan.

The English translation of these passages reads as follows:

> In this case I hold that the deceased's signature in what was alleged to be the deceased's will was not the signature of the deceased. I accept the reasons given by PW4 and PW6. *To me a good way of countering the evidence from these expert witnesses is to bring another expert witness who is able to give an opposing opinion and the Defendants' failure to bring their own expert witnesses was prejudicial to the Defendants' case.*
>
> After perusing the evidence of all witnesses as to the deceased's soundness of mind and his character and also the evidence from the handwriting experts, I hold that it is beyond reasonable doubt that the will of Gan Phui Chee @ Gan Chuan Lian dated 16.4.97 was a forgery. (emphasis added.)

Mr. Abraham's complaint here is that while the learned judicial commissioner cited the correct law, namely, on the danger of acting on the evidence of handwriting experts, he erred in the application of that law to the facts of the present case. Counsel's submission raises the question whether the learned judicial commissioner adopted the correct approach to the opinion evidence of the handwriting experts.

In his judgment the learned judicial commissioner reproduced passages from several cases that have expressed a negative view about the nature of expert evidence. We do not consider it necessary to go through all those cases here. We respectfully adopt the views expressed in those cases about the unsatisfactory nature of the opinion evidence of handwriting experts. However, we consider it useful to mention an authority not referred to in the judgment under appeal. We do so only because it is a case that is of particular significance to the present case as it also involved the proof of handwriting in Chinese characters. It is *Teng Kum Seng v. Public Prosecutor* [1960] MLJ 225 where Thomson CJ when dealing with a complaint that the evidence of a handwriting expert had been given undue weight said: "Such evidence is of course always of very questionable value, particularly in the case of Chinese characters."

We would note that in the present case, while the learned judicial commissioner may have discussed the unsatisfactory nature of expert opinion evidence on handwriting in a general way, he certainly did not take into account the added danger of accepting such evidence in the particular context of Chinese characters. For, nowhere in the judgment under appeal is there any mention of this point. On the contrary, the learned judicial commissioner appears to have

placed undue weight on the opinion evidence of the experts. Hence his remark in the above quoted passage in his judgment to which we have lent emphasis. That brings us to the next point.

The issue is whether the learned judicial commissioner was correct in holding that "a good way of countering the evidence from these expert witnesses is to bring another expert witness who is able to give an opposing opinion". In our judgment, the foregoing comment of the learned judicial commissioner when read in the context of the rest of his judgment as a whole leads us to the inescapable conclusion that the learned judicial commissioner was only prepared to displace in his judicial mind the evidence of one set of experts with another. We are respectfully of the view that the trial court fell into serious error when adopting what we regard as an over-simplistic approach to the evaluation of the totality of the evidence.

We consider it to be a well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence. Thus, in *Newton v. Ricketts* [1861] 11 ER731, it was held as follows:

> Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole attesting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that Court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.

Newton v. Ricketts (supra) was applied in *Kameswara Rao v. Suryaprakasarao* AIR [1962] AP 178, a case concerning the challenge as to the genuineness of a will, where it was held as follows:

> The opinion of a handwriting expert is, no doubt admissible under s. 45 [Evidence Act]. What value is to be attached to that opinion in a given case is, however entirely a different matter. An expert's opinion with respect to handwriting must always be received with great caution. There certainly may be, and perhaps are cases where the handwriting expert's opinion may be of assistance to the Court in coming to a conclusion as to the genuineness of disputed hand-writing. But the art of forming opinion by comparison of hand-writing is essentially empirical in character and error is seldom inseparable from such opinions. Where however, there is direct and trustworthy evidence of persons who had actually seen the signing of the document by the testatrix, it is not necessary to refer to or rely on the expert opinion.

So too here. For the reasons already given, DW2 was clearly a disinterested witness. With great respect to the learned judicial commissioner, his failure to properly appreciate her evidence and to give it the due weight renders his appraisal of this witness to lose its value. So far as DW3 and DW12 are concerned, there was simply no appraisal at all. It follows that the learned judicial commissioner erred in not preferring the evidence of DW2 and DW3 to that of the handwriting experts.

There is one other matter that needs mention. It will be seen that the learned judicial commissioner said that in coming to the conclusion that the will was a forgery, he took into account "the evidence of all witnesses as to the deceased's soundness of mind and his character". But it is a matter of immediate importance to note that at that stage of his inquiry, the learned judicial commissioner was yet to inquire into the issue of the deceased's soundness of mind. Indeed, that was the very next issue that he addressed in his judgment. It follows with great respect to the learned judicial commissioner that he had already arrived at a concluded view on the issue of the deceased's soundness of mind even before commencing his inquiry into that very issue. This in our judgment constitutes a serious misdirection which has had the effect of depriving the defendants of substantive justice.

(D) Miscellaneous Points

Apart from the foregoing issues, counsel before us raised and dealt with several other matters such as the existence of suspicious circumstances. These include the failure of the second defendant to give evidence which led the trial court to draw an adverse inference; the fact that part of the instructions for the will in the form of D3A and D3B were photocopies and not originals; and what Dato (Dr.) Das referred to as "the page three mysteries" of the will.

While we appreciate the effort put in by counsel on both sides to take us through each and every conceivable issue of fact in this case, we find it unnecessary to deal with these. Suffice to say that all the so-called suspicious circumstances were more than adequately explained by both DW2 and DW3. Further, in our considered judgment, once the evidence of DW2, DW3 and DW12 is accepted – as indeed we do – that the deceased understood the dispositions of the will, and that it was duly executed by him as his will, there is an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will.

We pause here to refer to the case of *Arunachalam Chetty v. Ramaswami Chetty* [1916] 20 CWN 673, which we find to be of some assistance. That was also a case in which a will came under challenge. On the last page of the will the writing was inconveniently crowded above the signature of the testator. Further, the last page but one had at the foot of the page writing

that was placed in such a way as to lend colour to the suggestion that the page had been filled up after the signature had been attached. Attesting witnesses, including a doctor gave evidence. The trial judge rejected the evidence of these witnesses. He held that there had been a dishonest conspiracy; that the signature of the testator had been obtained first and that the page had been filled up later. Accordingly he held the will not to be genuine. On appeal, the High Court at Madras reversed the trial judge. On further appeal, the Privy Council affirmed the decision of the High Court. The Lord Chancellor (Lord Buckmaster) delivered the advice of the board in language we find to be apposite to the present case:

> Their Lordships think that the real fact that explains the judgment of the District Judge is this: When the Will is examined it appears that the last page has the writing inconveniently crowded above the signature of the testator, and the last page but one has also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. It goes no further than that; but upon that it appears that the learned Judge has built up a theory of a dishonest conspiracy with regard to the preparation of this Will, which their Lordships are clear Dr. Van Allen's evidence completely destroys. If the view were right that this Will had been written on blank pages over signatures of the testator previously obtained, it would have been quite impossible for Dr. Van Allen to have said, as he did again and again, that he saw the deceased execute the Will, and it would have been equally impossible for Dr. Van Allen to have attested on the last page of the Will the signature of the deceased without noticing that there was no writing whatever over it. Remembering his responsibilities, as he clearly did, as an attesting witness, he would have been quite unable, if the paper was blank, to have come and said, in the plain words which he used, that he saw the signature of the deceased attached to this document.
>
> These are the reasons that convince their Lordships that, whatever may be the true cause of the inconvenient way in which some of this writing appears, the explanation is not and cannot be the one that the learned Judge has assigned; it would indeed be most unsafe and most undesirable in circumstances such as these to try to spell out from the peculiar form in which a document written in the vernacular appears a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor who witnessed the Will.
>
> Their Lordships only desire to add, in conclusion, this: *When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted few things can be more: dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice.* (emphasis added.)

So too in the present case, DW2 and DW3 are disinterested witnesses whose evidence is to be trusted for the reasons already stated. They gave positive evidence of the due execution of the will by the deceased and of the deceased's testamentary capacity. Their evidence accords with the probabilities of the case and has the added strength of being corroborated by the evidence of DW12. The High Court therefore erred in acting upon a contrary theory that lacked any proper evidential basis.

It follows from what we have said thus far that it is unnecessary to test the credibility of the other defence witnesses. But it must be said in fairness to the first defendant who gave evidence on oath that his evidence is consistent with that of DW2 and DW3. We therefore consider it entirely unfortunate that the learned judicial commissioner disbelieved the first defendant purely on the basis that the since the deceased, while he was in hospital had a line into his hand for a transfusion or a drip he could not have handed a photocopy his identity card to the first defendant. Against this rather slender supposition is the much stronger probability that the photocopy of the deceased's identity card could not have come into DW2's possession in any way other than that described by the first defendant. Further, it is to be noted that if there was anything amiss, one would have expected a vehement protest from the deceased who, by all accounts, was a strong willed man with a ready temper. Yet, the fact that he did not raise any protest to DW2 or DW3 when the will was explained to him and placed before him for his signature and the fact that he signed it provides ample corroboration of the first defendant's story.

It was submitted for the plaintiffs before us that since the deceased had loved his daughters much more than his sons; showing little more than contempt for the latter; it is surprising that he should leave only a small bequest to each of the plaintiffs. With respect, we are unable to accept this argument. A Court of Probate must first be satisfied that a testator understood the dispositions of a will, and that it was duly executed by him as his will. Once so satisfied, it is not concerned with the fairness of the will. A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just. Here, we would gratefully adopt the language of Lord Buckmaster in *Arunachalam Chetty v. Ramaswami Chetty (supra)*, in the passage to which we have lent emphasis.

In *Surendra Pal v. Saraswati Arora* AIR [1974] SC 1999, Jaganmohan Reddy, J, after quoting the following passage from the Privy Council case of *Motibai Hormusjee v. Jamsetjee* AIR [1924] PC 28, 33:

> A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition.

went on to say as follows:

> It is not for us to fathom the motivations of a man. His actions and reactions are unpredictable as they depend upon so many circumstances. There is, however, always some dominant and impelling circumstances which motivate a man's action though in some cases even a trivial and trifling cause impels him to act in a particular way which a majority of others may not do. At times psychological factors and the frame of mind in which he is, may determine his action.

We gratefully adopt what his lordship said in the above quoted case. However, in the circumstances of the present instance, if it be necessary at all to look for the righteousness of the will and its rationality we find there is abundant evidence from which these matters may be inferred.

First, the deceased was in his last illness when he made his will. No doubt the deceased was never told about the aggressive nature of the disease he was suffering from. Nevertheless, it is more than probable from the state of his own physical health that the deceased knew that he was very ill and may not last long. He could not swallow. He was losing blood and needed a transfusion. In this state of affairs it was quite natural for him to want to make a will. In fact, he had asked his usual solicitor to attend on him to prepare a will. But his solicitor did not keep the appointment. So, the deceased made other arrangements. And entirely in keeping with his nature, he specifically asked for an inexpensive solicitor. He did not make this request of a total stranger but of a man he knew to be a close friend of his son.

Second, he had, during his lifetime, treated his sons with scarce respect. With death fast approaching, he probably regretted this. Perhaps he felt remorse for what he had done. And remorse in a dying man is a strong emotion. It may make him act in strange ways towards persons whom he has mistreated during his lifetime. His daughters were well settled. Each daughter had her own family. Neither daughter lived as part of the joint family. By contrast, the sons lived with him as part of the joint family and had nothing save a pittance as salary. He was probably most concerned about their future. Hence, there was every reason for the deceased to prefer his sons to his daughters.

Lastly, there is the fact that he left a bequest to the fifth defendant, the male nurse who looked after him and whom he had known for about 30 years. It is probable that the deceased did so out of gratitude and affection for the man who had done so much for him during his illness and to whom he paid a pittance during his lifetime for the service he rendered. Such a gift as this is entirely consistent with ordinary human nature.

The Shares And The Fixed Deposits

The facts relevant to this part of the case are as follows. After the reading of the will, the deceased's safes were opened. Several envelopes containing shares of Malayan Banking Berhad were found. Each envelope had a name written on it. These envelopes were distributed to the second, third and fourth defendants as well as the first and second plaintiffs according to the names appearing on each envelope. The case for the defendants was that these were gifts made by the deceased to those of his children whose names appeared on the envelope.

The learned judicial commissioner treated the aforesaid shares on the footing of a gift made by the deceased in contemplation of his death, that is to say, a *donatio mortis causa*. He found the elements of such a gift not to be satisfied and accordingly held the shares to form part of the deceased's estate.

Mr Lazar for the defendants complained about the trial court's finding based on the evidence. He said that the High Court appears to have proceeded on the assumption that it was only the second, third and fourth defendants who had benefited from the alleged gift of the shares. We think that the complaint is well founded. It is evident from the judgment under appeal that the learned judicial commissioner once again focussed only on the evidence of the third defendant under cross-examination without mentioning the evidence of the plaintiffs and their admission that they too had received envelopes containing the shares in question. But for reasons that will appear shortly, the error of which counsel justifiably makes complaint is of no consequence to the result.

With respect to the High Court and to counsel before us, we see no relevance whatsoever of the concept of a *donatio mortis causa* to the facts of this case. An essential condition of a *donatio mortis causa* is that "the gift or donation must have been made in contemplation, though not necessarily in expectation of death" (See, *Cain v. Moon* [1896] 2 QB 283 at p. 286). But the evidence here is **not** that the deceased made a death bed gift of the shares in question. On the contrary, the evidence here is that these shares were the subject of an alleged gift *inter vivos.*

Nevertheless, it is equally clear from the totality of the circumstances of the case that it was not the intention of the deceased – indeed it would be quite out of sync with his character – that the gift in question was to take effect at once. Had that been his intention, he would have simply handed over the shares to each of his children long before his death. The fact that he did not do so and instead kept them in his safe and under his control though marked for each of the intended recipient shows an intention on his part that the gift was to take effect only after his death. Therefore the question here is whether there

was a valid *inter vivos* gift in the present case. In order to answer that question and determine the effect in law of the gift in this case, it is necessary to hearken to first principles.

We begin with the proposition that there are three and only three ways in which a gift *inter vivos* may be made. First, by an outright transfer of the property to the intended donee. Second, by a transfer of the property absolutely to trustees to hold on trust for the donee. Third, by the owner declaring himself as trustee for the donee. An ineffective outright gift will not be saved by the court by construing it as a declaration of trust because "there is no equity in this court to perfect an imperfect gift": *Milroy v. Lord* [1862] 45 ER 1185, per Turner LJ. We find the decision in *Jones v. Lock* [1865] 1 Ch. App 25 to be a ready illustration of the principle we have just stated.

It follows that an *inter vivos* gift that is not effected in one of the three ways aforesaid can only take effect either as a testamentary gift under a will of a testator or pass under an intestacy. And if the donor intends to make a testamentary gift he must observe the requirements of the Wills Act. Here we would quote with approval the following passage from Scott's leading work *"The Law of Trusts"*, 4th edn at p. 94, which in our view correctly sets out the law:

> The owner of property may intend to create a trust of the property, either by transferring it to another person as trustee or by declaring himself trustee of it. In either event, if the beneficiaries do not acquire any interest in the property prior to his death, the transaction is clearly testamentary and invalid unless there is a compliance with the requirements of the Statute of Wills.

Were it otherwise then it would, in the words of Viscount Sumner in *Blackwell v. Blackwell* [1929] AC 318, 339 "enable the testator to 'give the go-by' to the requirements of the Wills Act, because he did not choose to comply with them".

Applying the foregoing principles to the present appeal, it is our considered judgment that the so-called gift of the shares in question was in reality a testamentary gift. Since it was not made in accordance with the provisions of the Wills Act, it is utterly void. The shares therefore form part of the deceased's estate. Since the deceased in his will has provided for a residue of his estate, all the shares form part of the general residue and fall to be dealt with as directed by the deceased's will. It must be left to the first defendant to take such steps as are necessary to retrieve the shares from those who have taken them. We therefore agree with the High Court on the invalidity of the gift in question but for very different reasons.

We now turn to the fixed deposit accounts in Singapore. These were in the joint names of the deceased and/or the third defendant. The third defendant had agreed at the trial to produce the terms on which the deposits were held since it was his case that he was, as survivor, entitled to the monies in the accounts in question. But he did not produce the relevant documents. The learned judicial commissioner unsurprisingly found against the third defendant on the point. We agree with his finding. The monies in question accordingly form part of the residue and are to be disposed of as directed by the will. The third defendant must accordingly account to the first defendant as executor for the monies in question.

The Result

For the reasons given, the appeal is allowed. The orders made by the learned judicial commissioner on the plaintiffs' writ and statement of claim are hereby set aside. But the orders he made in respect of the shares and the fixed deposit shall stand. Both these assets shall form part of the deceased's estate under the will. So are all the interim orders set aside save the consent order dated 1 September 1997 in respect of which we invite assistance from counsel before we may deal with it.

We make the following further orders on this appeal. The plaintiffs' action is hereby dismissed. The counterclaims are hereby granted. The Petition for Probate No. 32-36-97 is hereby granted and we direct that the last will and testament of Gan Puay Chee dated 16 April 1997 is proved and be and is hereby admitted to probate. The grant of probate in favour of the first defendant as sole executor of the said will shall issue forthwith. The defendants shall generally be at liberty to apply to the High Court for such further orders and directions as are necessarily consequent to the orders made thus far by this court.

We now invite counsel to address us on the question of costs, in particular as to whether these should be borne by the estate or the plaintiffs and as to whether a certificate for two counsel should issue.